UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of: NICOLE WILLIAMS, Complainant, v. QUANG DANGTRAN, HA NGUYEN, and HQD ENTERPRISE, LLC, Respondents.	19-AF-0148-FH-015 November 26, 2019

ORDER CERTIFYING RULING FOR INTERLOCUTORY REVIEW

The above-captioned matter, set for hearing beginning on March 10, 2020, arises from a *Charge of Discrimination* filed by the U.S. Department of Housing and Urban Development ("HUD"), as Charging Party, on behalf of Nicole Williams ("Complainant") against Quang Dangtran, Ha Nguyen, and HQD Enterprise, LLC (collectively, "Respondents") pursuant to the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.* ("the Act"), as implemented by 24 C.F.R part 180.

On October 24, 2019, the Court issued a *Ruling on Summary Judgment.* Respondents have now filed a motion styled "*Appeal of the Administrative Law Judge Ruling*" through which they request reconsideration and/or reversal of the October 24 ruling. The Charging Party argues that Respondents' request should be denied because no mechanism exists for them to appeal an interlocutory ruling in this matter. As a threshold matter, the Court will consider whether interlocutory review is available.

I. Availability of Interlocutory Review

Under the Fair Housing Act, original jurisdiction to try this matter is conferred upon the administrative law judges (ALJs) of this Court, see 42 U.S.C. § 3612(b), while appellate jurisdiction vests in the Secretary of HUD, see id. § 3612(h) (authorizing Secretary to review ALJ's dispositive findings, conclusions, and orders within 30 days). Trial of this matter is subject to the rules of practice and procedure set forth in 24 C.F.R. part 180. See 24 C.F.R. § 180.105(a) (applying part 180 to civil rights matters before HUD ALJs); see also 42 U.S.C. § 3612(d)(3) (authorizing Secretary to issue the part 180 rules). Part 180 establishes procedures whereby the parties may appeal an ALJ's ultimate decision to the Secretary, see id. § 180.675, but is silent as to the possibility of interlocutory appeal.

However, the rules of procedure generally applicable to all hearings before HUD ALJs, which are found in 24 C.F.R. part 26, subpart B, provide an avenue for interlocutory appeal. Specifically, § 26.51 permits the Secretary to review an ALJ's interlocutory ruling if it involves an "important issue of law or policy as to which there is substantial ground for difference of opinion" and "immediate appeal ... may materially advance the ultimate termination of the litigation." 24 C.F.R. § 26.51.

This rule mirrors the statute allowing interlocutory appeals in the Article III court system. See 28 U.S.C. § 1292(b) (permitting appeal of an interlocutory order that involves "a controlling question of law as to which there is substantial ground for difference of opinion" where "immediate appeal ... may materially advance the ultimate termination of the litigation"). Congress enacted the interlocutory appeals statute with the intent of creating a "medium through which to test the correctness of some isolated identifiable point ... upon which in a realistic way the whole case or defense will turn" without "wast[ing] precious judicial time while the case grinds through to a final judgment." Hadjipateras v. Pacifica, S.A., 290 F.2d 697, 703 (5th Cir. 1961). In other words, the purpose of interlocutory appeal is to provide a mechanism for immediate and expeditious resolution of issues deemed "pivotal and debatable." Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 46 (1995).

Despite the general availability of interlocutory appeal to promote swift and efficient resolution of pivotal issues, the Charging Party argues that it is not available in this particular case because 24 C.F.R. § 26.51 cannot be applied to Fair Housing cases. The Court disagrees. As acknowledged by the Charging Party, both the Court and the Secretary recently applied § 26.51 in another Fair Housing case in which the Charging Party itself asked the Secretary to weigh in on an interlocutory ruling. See Secretarial Order, HUD *ex rel.* van der Pool v. Heathermoor II, LLC, HUDOHA No. 18-JM-0253-FH-022 (HUD Sec'y Sept. 20, 2019); Order Denying Certification for Interlocutory Review, HUD *ex rel.* van der Pool v. Heathermoor II, LLC, HUDOHA No. 18-JM-0253-FH-022 (HUD ALJ Aug. 23, 2019).[1]

[1] The Charging Party acknowledges that it "made limited argument pertaining to 24 C.F.R. 26.51 in response to the Court's suggestions that interlocutory appeals might be available" in Heathermoor. In fact, the Charging Party twice appealed directly to the Secretary for relief from the Court's interlocutory rulings in that case, but the Secretary declined to intervene, stating: "In Fair Housing Act cases, the Secretary, or designee, has jurisdiction to review ... a Petition for Review of an ALJ's Interlocutory Ruling after the ALJ's determination regarding certification under 24 C.F.R. § 26.51 ... [but] HUD's Petition for Reconsideration does not satisfy 24 C.F.R. § 26.51(b)." See page 2 of the September 20, 2019 Secretarial Order in Heathermoor. It is somewhat disingenuous for the Charging Party, after requesting Secretarial intervention in Heathermoor and being rejected on the basis of failure to comply with 24 C.F.R. § 26.51, to now argue that its opponent is precluded from even requesting such intervention in this case. Indeed, the Charging Party acknowledged in Heathermoor that "in fact, 24 C.F.R. 26.51(c) specifically provides such a mechanism when it provides that '[t]he Secretary ... has the discretion to grant ... a petition for review from an uncertified ruling.'" Charging Party's Supplement to Its Previously-Filed "Charging Party's Unopposed Request for a Secretarial Order Dismissing a Fair Housing Act Charge That Has Been Settled by Agreement of All Parties, HUD *ex rel.* van der Pool v. Heathermoor II, LLC, HUDOHA No. 18-JM-0253-FH-022 (Aug. 29, 2019). At least, that's when the Charging Party stayed within the Act's regulatory framework. In a later Heathermoor filing, the Charging Party added that it "was asking the Secretary to supervise his employee, the ALJ, and to direct that employee to cease issuing orders concerning a matter over which the ALJ no longer has jurisdiction." Unopposed Petition for Reconsideration of Secretarial Order and to Vacate Hearing, HUD *ex rel.* van der Pool v. Heathermoor II, LLC, HUDOHA No. 18-JM-0253-FH-022 (Sept. 17, 2019).

The second Heathermoor argument was troubling. In essence, the Charging Party appeared to seek a "personnel" resolution through a case being litigated in the Department's administrative litigation program, thereby conflating the Secretary's supervisory authority with his political authority (*ergo* the power to review a decision with the power to supervise an employee). It is undeniable that the Secretary has both powers. However, different venues are

Moreover, the part 26 procedural rules, including § 26.51, were promulgated under the Administrative Procedure Act (5 U.S.C. §§ 551 *et seq.*, "the APA") and are generally applicable to all HUD ALJ hearings, which must comport with the APA. See 24 C.F.R. § 26.28. In fact, the Fair Housing Act contemplates that administrative housing discrimination hearings will comply with the APA, as it delegates the conduct of such hearings to "an administrative law judge appointed under section 3105 of title 5," which provides for the appointment of ALJs to conduct APA hearings. See 42 U.S.C. § 3612(b); 5 U.S.C. § 3105. Thus, hearings before an ALJ under the Fair Housing Act are a subset of APA hearings to which the part 26 regulations are generally applicable.

It is true that the Secretary has promulgated specific regulations governing the procedure of Fair Housing hearings in 24 C.F.R. part 180. The specific regulations supersede the general under most circumstances. But it is not inappropriate to look to the general regulations for guidance where the specific regulations are silent—as is the case with regard to interlocutory review. In fact, part 180 itself encourages flexibility in its application, referring ALJs to the Federal Rules of Civil Procedure as a guide and permitting an ALJ to "modify or waive any of the rules in this part upon a determination that no person will be prejudiced and that the ends of justice will be served." 24 C.F.R. § 180.105(b), (d). Allowing interlocutory appeals prejudices no one and serves the ends of justice by saving the parties and Court from wasting time and resources on potentially needless litigation. Although part 180 does not expressly provide for interlocutory appeals, 24 C.F.R. § 26.51 provides an avenue for such appeals that does not conflict with the part 180 rules and is analogous to the procedures that would have been available to the parties under 28 U.S.C. § 1292(b) if they had chosen to litigate this matter in an Article III court. Thus, it is reasonable to apply 24 C.F.R. § 26.51 in conjunction with part 180.[2]

For the foregoing reasons, the Court concludes that interlocutory review is available in this proceeding under 24 C.F.R. § 26.51.

II. Respondents' *Appeal of the Administrative Law Judge Ruling*

Respondents' *Appeal of the Administrative Law Judge Ruling* takes issue with an earlier ruling by this Court declining to dismiss the Charging Party's allegations against Respondents. By way of background, this case centers on the Charging Party's allegations that Respondents, as owners and landlords of a 5-bedroom home in Plano, Texas, discriminated against Complainant, a prospective tenant, because of her race or color. Specifically, the *Charge of Discrimination* alleges that Respondents (1) posted a discriminatory housing advertisement on Craigslist, in violation of section 804(c) of the Act; (2) made a discriminatory statement to Complainant, also

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appropriate for the exercise of each. And conflating these powers only leads to issues that strike at the heart of Administrative Law Judge independence.

It remains the view of this Court, which does not have the luxury of changing its procedures (or analysis) to suit a litigation position, that 24 C.F.R. § 26.51 sets forth the proper procedure for interlocutory appeal of ALJ rulings in Fair Housing proceedings.

[2] Cf. Conn. Nat'l Bank v. Germain, 503 U.S. 249 (1992) (applying the general interlocutory appeals statute at 28 U.S.C. § 1292 in conjunction with a more specific statute establishing a special avenue for appeals of final orders in bankruptcy proceedings). In a concurring opinion, Justice O'Connor explained it was unlikely that Congress intended to disturb the appellate courts' traditional exercise of jurisdiction over interlocutory appeals by the roundabout method of conferring special jurisdiction over final appeals. Id. at 256 (O'Connor, J., concurring).

in violation of section 804(c) of the Act; and (3) refused to negotiate a room rental with Complainant because of her race, in violation of section 804(a) of the Act. See 42 U.S.C. § 3604(a), (c).

On September 5, 2019, Respondents filed a *Motion for Summary Judgement* asking the Court to dismiss the charges against them. Respondents denied engaging in any discriminatory conduct; argued that enforcing the Act against them would raise constitutional concerns, citing Fair Housing Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216 (9th Cir. 2012) (hereinafter "Roommate.com"); and argued that the Court lacked jurisdiction to hear this case due to the "Mrs. Murphy" exemption, codified at 42 U.S.C. § 3603(b)(2).

The Charging Party opposed Respondents' *Motion for Summary Judgement*. The Charging Party also filed a cross-motion seeking partial summary judgment on its claim that Respondents had violated section 804(c) of the Act by posting a discriminatory housing advertisement on Craigslist.

On October 24, 2019, the Court issued a *Ruling on Summary Judgment*, a copy of which is attached to this order and incorporated by reference. The Court found that Roommate.com was wrongly decided and rejected Respondents' argument that the Act could not be enforced against them due to constitutional concerns. The Court also noted that, even if it were to follow Roommate.com, the record did not yet establish whether the facts of the instant case are sufficiently analogous to apply the Roommate.com decision. The Court further found that material facts remained in dispute as to whether the Mrs. Murphy exemption applies, whether Respondents violated section 804(c) by making discriminatory statements, and whether Respondents violated section 804(a). Accordingly, the Court denied Respondents' *Motion for Summary Judgement*. However, the Court granted HUD's *Motion for Partial Summary Judgment*, finding that no material disputes of fact remained with regard to the Craigslist advertisement and concluding that the advertisement was facially discriminatory under 804(c).

Respondents, through their *Appeal of the Administrative Law Judge Ruling*, now ask that the *Ruling on Summary Judgment* be reconsidered and/or reversed.

Upon reconsideration, the Court stands by its findings. Although Respondents argue that the Court failed to properly consider and apply the Mrs. Murphy exemption, the *Ruling on Summary Judgment* explained that material facts remain in dispute as to whether the exemption is available in this case. Thus, the factual record must be further developed before the exemption can be considered or applied. And although Respondents assert that they sometimes rent to tenants outside their race—an allegation which, if proven, may tend to show whether they acted with discriminatory intent—they have not yet offered evidence to support this new factual allegation. The new, as-yet unproven allegation does not change the Court's opinion that material facts remain in dispute on all issues except the issue of whether Respondents posted a discriminatory housing advertisement.[3] Finally, although Respondents assert that the Court

[3] Discriminatory intent is not a required element of an 804(c) violation; the standard for a discriminatory housing ad is simply whether its content would suggest to an ordinary reader that a particular protected group is preferred or dispreferred. Jancik v. Dep't of Hous. & Urban Dev., 44 F.3d 553, 556 (7th Cir. 1995); Inclusive Cmtys. Project, Inc. v. Lincoln Prop. Co., No. 3:17-CV-206-K, 2017 U.S. Dist. LEXIS 130818, at *31 (N.D. Tex. Aug. 16, 2017), aff'd, 920 F.3d 890 (5th Cir. 2019); see Ragin v. New York Times Co., 923 F.2d 995, 1000 (2d Cir. 1991) ("[T]he

abused its discretion in refusing to follow the Ninth Circuit's decision in Roommate.com, the Ninth Circuit's decisions are not binding on the Court in this matter,[4] and Respondents have not raised any new legal arguments that would persuade the Court that Roommate.com was correctly decided. For these reasons, the Court declines to modify its October 24, 2019 *Ruling on Summary Judgment* on reconsideration.

Because Respondents have filed an "appeal," the Court will treat their filing not just as a request for reconsideration, but also as a request for certification for interlocutory review under 24 C.F.R. § 26.51. The ALJ may certify an interlocutory ruling for Secretarial review if (1) the ruling involves an important issue of law or policy as to which there is substantial ground for difference of opinion, and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation. 24 C.F.R. § 26.51(a)(1)-(2).[5] After consideration, the Court will certify the October 24, 2019 *Ruling on Summary Judgment* for interlocutory review, for the following reasons.[6]

A. The ruling involves an important issue of law or policy as to which there is substantial ground for difference of opinion.

Respondents' constitutional argument against enforcement of the Act, which is predicated upon the Ninth Circuit's holding in Roommate.com, raises important issues of law and policy as to which there is substantial ground for difference of opinion.

As explained in the *Ruling on Summary Judgment* (see pages 2-3 of the *Ruling*), this administrative Court lacks authority to deem the Act unconstitutional. See also Califano v. Sanders, 430 U.S. 99, 109 (1977) (stating that constitutional questions are "unsuited to resolution in administrative hearing procedures"). However, in Roommate.com, the Ninth Circuit did not actually invalidate any portion of the Act as unconstitutional, but simply construed the Act's coverage narrowly in order to avoid purported constitutional concerns relating to privacy, safety,

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statute prohibits all ads that indicate a racial preference to an ordinary reader whatever the advertiser's intent."). Further, section 804(c) is not subject the Mrs. Murphy exemption. See 42 U.S.C. § 3603(b)(2). Thus, Respondents' arguments regarding their intent and the Mrs. Murphy exemption do not impact the Court's grant of summary judgment as to the Craigslist ad.

[4] As noted above, immediate appellate jurisdiction over this matter vests in the Secretary of HUD. 42 U.S.C. § 3612(h). HUD's final order, whether issued by the Secretary or an ALJ, may be appealed in the judicial circuit where the discriminatory housing practice is alleged to have occurred. Id. § 3612(i). The instant case arose in the Fifth Circuit. Thus, caselaw from other circuits, including the Ninth Circuit, serves only as persuasive authority in this matter.

[5] The regulation also states that a request for certification must be filed within 10 days of the ruling that is being appealed. 24 C.F.R. § 26.51(a). Thus, in this case, a request for certification was due on Monday, November 4, 2019. The Charging Party argues that Respondents' *Appeal of the Administrative Law Judge Ruling*, to the extent it can be construed as a request for certification, should be denied as untimely because it was not filed until November 7, 2019 (the date it was emailed to the Court and Charging Party). However, the filing was signed on November 4, 2019, and Respondents submitted a receipt indicating a hard copy was sent to the Court via USPS priority mail on November 5, 2019. Given that Respondents are proceeding *pro se* in this matter, and in the absence of any indications of bad faith or prejudice, the Court will accept Respondents' filing under 24 C.F.R. § 26.51.

[6] Specifically, the Court's finding that Roommate.com was wrongly decided and its rejection of Respondents' associated constitutional argument are appropriate for interlocutory review, because if the Court had reached a different conclusion as to either of these issues, they could impact Respondents' liability under all three counts in the *Charge of Discrimination.*

autonomy, and intimate association. Specifically, the Ninth Circuit found that the reach of the Act must turn on the meaning of the word "dwelling." Roommate.com, 666 F.3d at 1219. Then, reasoning that Congress could not have intended a "dwelling" to include portions of single-family homes or apartments in which living space is shared by roommates, the Ninth Circuit adopted a "narrower construction that excludes roommate selection from the reach of the [Act]" and concluded that the Act "doesn't apply to the sharing of living spaces." Id. at 1222.

Respondents now maintain that this Court should have followed the Ninth Circuit's approach in construing the Act narrowly. Respondents indicate that, if the Ninth Circuit's approach is rejected, a roommate search will not be protected from governmental intrusion, and conduct such as helping a person search for a roommate of a certain sex will be against the law.

A roommate search, by itself, is not unlawful under the Fair Housing Act. The Act is not intended to limit free association. The statute imposes restrictions on certain housing-related activities, such as those enumerated in section 804, with the goal of "provid[ing], within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. However, searching for a roommate is not one of the activities singled out for regulation.

Consistent with this understanding of the Act's scope, in the *Ruling on Summary Judgment* (see footnote 4 on page 5 of the *Ruling*), the Court noted that if the defendant in Roommate.com had done nothing more than introduce compatible users to each other so they could live together, this conduct, which could be viewed as merely facilitating free association, likely would not run afoul of the Act. On the other hand, if a defendant provides a platform for the posting of discriminatory housing advertisements, and users actually post such ads "with respect to the sale or rental of a dwelling," the Court believes that the Act's protections are triggered due to the involvement of an actual "dwelling" that is being sold or rented. See 42 U.S.C. § 3604(c) (prohibiting any discriminatory ads that pertain to the sale or rental of a dwelling).

This is so because of the structure of the statute. In interpreting section 804 of the Act, the Ninth Circuit stated that "[t]he pivotal question is whether the FHA applies to roommates." Roommate.com, 666 F.3d at 1219. But the statute does not specify who can or cannot be sued. It "focuses on prohibited *acts*." Meyer v. Holley, 537 U.S. 280, 285 (2003) (emphasis added). Section 804 simply declares that the designated acts "shall be unlawful," without predicating liability on the identity, status, or characteristics of the person who engaged in the wrongdoing. 42 U.S.C. § 3604. Thus, if a person posts a discriminatory advertisement with respect to the sale or rental of a dwelling, that person's status as a "roommate" makes no difference under 804(c)—the statute flatly prohibits discriminatory ads, regardless of who posts them.

The Ninth Circuit, however, sought to circumvent this flat prohibition in service of its belief that "roommates" should be exempted from liability. To execute this policy judgment, the Ninth Circuit conditioned the reach of the Act on the reach of the word "dwelling" and interpreted that term narrowly to exclude any dwellings in which the inhabitants qualify as "roommates" or share living space.

But the Act defines "dwelling" broadly. See 42 U.S.C. § 3602(b); see also Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 209 (1972) ("The language of the Act is broad and inclusive."). As discussed in the *Ruling on Summary Judgment* (see pages 5-6 of the *Ruling*), the statute contemplates that a "dwelling" falling within its coverage may consist of an individual room occupied by a family (which may consist of a single person, pursuant to 42 U.S.C. § 3602(c)) within a larger home where some living spaces are shared with other residents, a situation that can only be described as involving "roommates." And courts routinely apply the Act to such housing arrangements. See, e.g., Ho v. Donovan, 569 F.3d 677, 682 (7th Cir. 2009); Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1048 n.2 (9th Cir. 2007); Marya v. Slakey, 190 F. Supp. 2d 95 (D. Mass. 2001). Although Congress identified some situations, such as in the case of the Mrs. Murphy exemption, where dwellings are exempt from some of the Act's prohibitions, Congress chose not to make a blanket exception for housing arrangements involving roommates or shared living spaces.

Nonetheless, the Act does not unreasonably curtail an individual's ability to live with a roommate of his or her choosing. Respondents assert that if the Roommate.com decision is not followed, conduct such as helping a person search for a roommate of a certain sex will be against the law. But the Act has never allowed a defendant to escape liability by blaming his conduct on a third party's discriminatory intent. A woman who does not want to live with male roommates cannot force a landlord to cater to her discriminatory preference, as doing so might subject the landlord to liability under the Act. See LaFlamme v. New Horizons, Inc., 605 F. Supp. 2d 378, 393 (D. Conn. 2009) (rejecting argument that assisted living facility should enjoy leeway to discriminate against some tenants for the sake of others); Marya v. Slakey, 190 F. Supp. 2d at 104 (refusing to grant exemption from Act where landlord allowed existing tenant to veto prospective roommate for a discriminatory reason). However, the prospective tenant can find a female roommate and enter into an agreement to live together before approaching the landlord, and she can inquire about existing tenants before signing the lease. If she has already signed a lease and a male roommate is foisted upon her, she can always leave and seek alternate housing. The Act's anti-discrimination provisions do not in any way compel her to enter into or remain in a housing arrangement that she finds intolerable. Further, in general, if she has suffered legally cognizant harm to her use and enjoyment of the property, she may be able to seek recourse under state landlord-tenant law. See LaFlamme, 605 F. Supp. 2d at 393.

As for property owners who live on their own rental properties, meaning that their tenants also qualify as their roommates, the Act provides a safety valve in the Mrs. Murphy exemption. Congress inserted this provision into the Act to protect the rights of owner-occupants of small residential properties "who, by the direct personal nature of their activities, have a close personal relationship with their tenants." 114 Cong. Rec. 2495, 2495 (1968). Such landlords are exempt from all the requirements of section 804 except those in subsection 804(c), giving them the freedom to rent to tenants of their choosing. See 42 U.S.C. § 3603(b)(2).

But this does not mean that any landlord who resides onsite can invoke the Mrs. Murphy exemption and expect a get-out-of-jail-free card under all circumstances. As members of the nation's housing industry, property owners who rent residential space to others are never at liberty to completely ignore the Act and its goal of providing for fair housing throughout the country.

Thus, Congress limited the Mrs. Murphy exemption in several key ways, including by restricting its application to the owners of properties occupied by four or fewer families, and by making clear that a covered landlord is excused *only* from the requirements of subsections 804(a), (b), (d), (e), and (f) of the Act. 42 U.S.C. § 3603(b)(2); see, e.g., United States v. Hunter, 459 F.2d 205, 213-14 (4th Cir. 1972), cert. denied, 409 U.S. 934 (1972) (finding that "Mrs. Murphy" landlord was not exempt from subsection 804(c) and explaining that "[t]he draftsmen of the Act could not have made more explicit in their purpose to bar all discriminatory advertisements" even if posted by an otherwise exempt landlord); HUD v. Gruzdaitis, No. 02-96-0377-8, 1998 HUD ALJ LEXIS 39, at *9 (HUDALJ Aug. 14, 1998) (finding that "Mrs. Murphy" landlord is not exempt from section 818 of the Act). And courts have recognized the need to construe the Mrs. Murphy exemption, and all Fair Housing Act exemptions, narrowly to avoid undermining the Act's broad remedial purpose. See, e.g., Guider v. Bauer, 865 F. Supp. 492, 495 (N.D. Ill. 1994) (interpreting Mrs. Murphy exemption narrowly); HUD v. Dellipaoli, No. 02-94-0465-8, 1997 HUD ALJ LEXIS 22, at *12-13 (HUDALJ Jan. 7, 1997) (same); see also City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (indicating Act should be construed in a manner that promotes its policy goals); Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982) (citing Act's "broad remedial intent").

By contrast, in Roommate.com, the Ninth Circuit created a new exemption so broad that it both swallows the Mrs. Murphy exemption and creates a coverage gap, undermining the Act's protective goals. As the Court noted in the *Ruling on Summary Judgment* (see footnote 5 on page 6 of the *Ruling*), at least one court has already followed the Ninth Circuit's holding to reach a problematic result that conflicts with existing caselaw. See Kaeo-Tomaselli v. Butts. Civ. No. 11-00670 LEK/BMK, 2013 U.S. Dist. LEXIS 132917 (D. Haw. Sept. 17, 2013). In that case, the U.S. District Court for the District of Hawaii cited the "roommate exception" of Roommate.com to hold that a group home was entirely exempt from the Act. Id. at *9-10.

Thus, simply by invoking the term "roommates" and blaming their alleged discriminatory conduct on existing residents' discriminatory preferences, the owner and manager of the group home were given free license to engage in prohibited acts, and every resident and prospective resident on the property lost the protection of the Act. This demonstrates the overbroad scope of the Ninth Circuit's "roommate exception," which, unlike the Mrs. Murphy exemption, is not limited to small residential properties.

Also unlike the Mrs. Murphy exemption, the exemption created by the Ninth Circuit is not subject to any reasonable limitations as to the discriminatory conduct that is exempted. As noted above, "Mrs. Murphy" landlords are excused only from certain provisions of section 804, not to include subsection 804(c). The Court stated in the *Ruling on Summary Judgment* (see page 7 of the *Ruling*) that the singling out of subsection 804(c) signals a Congressional judgment that requiring a person to refrain from posting discriminatory advertisements or making discriminatory statements is not overly burdensome or intrusive, even when that person is a "Mrs. Murphy" landlord. In addition, unless landlords were required to include their "Mrs. Murphy" status in housing ads or notices, the Secretary would not be able to tell when the exemption applies, which would raise practical difficulties in the enforcement of 804(c).

The Roommate.com decision ignored these concerns and broadly applied the "roommate exception" to excuse an ad publisher from liability under 804(c). In support, the Ninth Circuit cited a housing case in which HUD investigators declined to file a charge of discrimination against a woman who had posted on her church bulletin board, "I am looking for a female christian rooomate." Roommate.com, 666 F.3d at 1222 (citing Fair Hous. Ctr. of W. Mich. v. Tricia, No. 05-10-1738-8 (Oct. 28, 2010) (Determination of No Reasonable Cause)).

As noted in the *Ruling on Summary Judgment* (see page 7 of the *Ruling*), it may have been appropriate for HUD to exercise its prosecutorial discretion not to pursue charges against the woman under the particular circumstances of that case. But the Ninth Circuit made a substantial leap when it concluded, based on that case, that anyone searching for a roommate is excused from the requirements of 804(c). This conclusion is so broad that it leads to classic slippery slope problems, as it would allow blatant discriminatory conduct that Congress intended to prohibit when it passed the Act.

For example, consider the result if a homeowner seeking to rent out a spare bedroom in her house, with the intent of sharing the common areas in the home, posted an advertisement that not only stated, "I am looking for a female Christian roommate," but added: "No Jews allowed in my house." The Mrs. Murphy exemption would not allow the homeowner to post such an advertisement because Congress determined that the exemption should not be available for discriminatory ads. Yet the Roommate.com decision would permit the ad, because it pertains to a housing arrangement involving roommates and shared space. Consider if the homeowner instead posted an ad stating: "I am looking for a white roommate. No blacks allowed." Again, the Mrs. Murphy exemption would not permit this ad. But Roommate.com would allow it, even though it contains the exact sort of expression of invidious discriminatory intent that the Act is intended to combat.

The Court believes that preventing a person from posting discriminatory housing ads, even if he qualifies as a Mrs. Murphy landlord or is seeking a roommate, does not burden his constitutional rights of privacy, safety, autonomy, or intimate association, as he remains free to exercise his discriminatory preferences when actually selecting a roommate. As has been stated by the Fourth Circuit, neither the Act nor the Constitution gives a person a positive right to advertise his discriminatory intent. Hunter, 459 F.2d at 213; see also Dellipaoli, 1997 HUD ALJ LEXIS 22, at *12-21. The Ninth Circuit erred in its attempt to create such a positive right in Roommate.com.

For the reasons discussed above and in the October 24, 2019 *Ruling on Summary Judgment*, the exemption created by the Ninth Circuit is so broad that it is inconsistent with the plain language, structure, and purpose of the Act, the limitations on the Act's existing exemptions, and prior caselaw interpreting the Act. Accordingly, this Court continues to believe that Roommate.com was wrongly decided.

Nonetheless, the validity of the Ninth Circuit's holding, as well as the weight it should be accorded by this Court, are important questions of law and policy. Clearly, there is substantial ground for difference of opinion as to whether it is unconstitutional to apply the Act to situations involving "roommates" and "the sharing of living units," as the Ninth Circuit held. Therefore,

these issues are appropriate for interlocutory review, if an immediate appeal will have the potential to advance the disposition of this matter.

B. An immediate appeal may materially advance the ultimate termination of this litigation.

The questions of whether Roommate.com was wrongly decided and whether it should be followed in this case are pivotal to this litigation. If Roommate.com is valid and controlling, and if Respondents establish that the facts of the instant case are sufficiently analogous to warrant application of the holding in Roommate.com, the Charging Party's entire case would disappear.

The ultimate termination of this litigation could be significantly delayed if the parties and Court were to proceed with an evidentiary hearing under the assumption that Roommate.com does not apply, only to learn on appeal that it should have been accorded controlling weight, and to have the case remanded after an appeal on this issue. Accordingly, the Court finds that interlocutory appeal of the *Ruling on Summary Judgment* may materially advance the ultimate termination of this litigation.

CONCLUSION AND ORDER

Because the Court's October 24, 2019 *Ruling on Summary Judgment* involves an important issue of law or policy as to which there is substantial ground for difference of opinion, and because an immediate appeal may materially advance the ultimate termination of this litigation, the Court hereby **CERTIFIES** the ruling for interlocutory review by the Secretary of HUD pursuant to 24 C.F.R. § 26.51.

The parties are advised that this proceeding will not be stayed pending Secretarial action on this Order. Thus, the hearing date and all prehearing deadlines set forth in this Court's prior orders remain in effect.

So **ORDERED.**

Alexander Fernández
Administrative Law Judge

Attachment:
October 24, 2019 *Ruling on Summary Judgment*

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF HEARINGS AND APPEALS

The Secretary, United States Department of Housing and Urban Development, Charging Party, on behalf of: NICOLE WILLIAMS, Complainant, v. QUANG DANGTRAN, HA NGUYEN, and HQD ENTERPRISE, LLC, Respondents.	19-AF-0148-FH-015 October 24, 2019

RULING ON SUMMARY JUDGMENT

The above-captioned matter, set for hearing beginning on March 10, 2020, arises from a *Charge of Discrimination* filed by the U.S. Department of Housing and Urban Development ("HUD") on behalf of Nicole Williams ("Complainant") against Quang Dangtran, Ha Nguyen, and HQD Enterprise, LLC (collectively, "Respondents") pursuant to the Fair Housing Act, 42 U.S.C. §§ 3601, *et seq.* ("the Act"), as implemented by 24 C.F.R part 180. The matter is currently before the Court upon the parties' competing motions for summary judgment.

BACKGROUND

Respondents are the owners and landlords of a 5-bedroom home in Plano, Texas. Respondents Dangtran and Nguyen reside in the home, but rent some of the bedrooms to other people. The *Charge of Discrimination* alleges that Respondents, as landlords of the subject property, discriminated against Complainant, who is black, by (1) posting a discriminatory housing advertisement, in violation of section 804(c) of the Act; (2) making a discriminatory statement, also in violation of section 804(c) of the Act; and (3) refusing to negotiate a room rental with Complainant because of her race, in violation of section 804(a) of the Act. See 42 U.S.C. § 3604(a), (c).

It is undisputed that, at some point prior to October 3, 2016, Respondent Dangtran placed a housing advertisement on Craigslist pertaining to the subject property. The advertisement stated: "I have 1 room available for rent in a 5 bedrooms [sic] home for professional only ... If you feel you qualify, please response [sic] with your brief description about yourself, race and age; and a recent picture of you."

On October 3, 2016, Complainant viewed the Craigslist advertisement and contacted Respondent Dangtran to express interest. Dangtran asked Complainant to provide a picture of herself, but she declined to do so. Nonetheless, Dangtran later agreed to meet Complainant at the subject property.

Dangtran met Complainant at the subject property on October 5, 2016. However, he refused to allow Complainant to enter the house or view the available room. Complainant alleges that Dangtran told her she could not rent the room because she is black. Respondents deny this allegation, instead asserting that Dangtran refused to show Complainant the room because Complainant said she would cook a lot.

LEGAL FRAMEWORK

Fair Housing Act. As noted above, HUD accuses Respondents of violating sections 804(a) and (c) of the Act. Section 804(a) makes it unlawful to, among other things, "refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race." 42 U.S.C. § 3604(a). Section 804(c) makes it unlawful "[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race ... or an intention to make any such preference, limitation, or discrimination." Id. § 3604(c).

Standard for Summary Judgment. Under the Federal Rules of Civil Procedure, a court may grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also 24 C.F.R. § 180.105(b). Thus, summary judgment is available only where the moving party demonstrates "lack of a genuine, triable issue of material fact" and where "under the governing law, there can be but one reasonable conclusion as to the outcome." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); see also Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1265 (5th Cir. 1991) (refusing to grant summary judgment where moving party's evidence was "too sheer" to sway a reasonable factfinder). An issue is "genuine" only if the evidence is such that a reasonable fact finder could rule in favor of either party. Anderson, 477 U.S. at 248. A fact is "material" only if it is capable of affecting the outcome of the case under governing law. Id.

On summary judgment, the court must view the evidence in the light most favorable to the party opposing judgment. Tolan v. Cotton, 572 U.S. 650, 657 (2014); United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Summary judgment is not available where material facts, "though undisputed, are susceptible to divergent inferences." Tao v. Freeh, 27 F.3d 635, 637 (D.C. Cir. 1994); see Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970) (requiring consideration of "reasonable inferences" that can be drawn from the facts). However, summary judgment is appropriate against a party who has failed to make a sufficient showing on an essential element as to which he has the burden of proof. Celotex, 477 U.S. at 322-23.

DISCUSSION

On September 5, 2019, Respondents filed a *Motion for Summary Judgement* asking the Court to dismiss this matter on several grounds.[1] Respondents suggest that the Act cannot be enforced against them because doing so would raise constitutional concerns. Respondents further argue that the Court lacks jurisdiction to hear this case pursuant to the so-called "Mrs. Murphy" exemption codified at section 803(b)(2) of the Act. See 42 U.S.C. § 3603(b)(2). Respondents also deny that any discrimination occurred.[2]

HUD timely filed a response in opposition. HUD disputes each of Respondents' arguments and asserts that summary judgment is inappropriate because HUD has not had adequate time and opportunity for discovery and because Respondents have failed to properly support their motion in accordance with the pertinent procedural requirements. On September 13, 2019, HUD further filed a *Motion for Partial Summary Judgment*, which Respondents oppose, asking the Court to grant summary judgment in HUD's favor on its claim that Respondents violated section 804(c) of the Act, 42 U.S.C. § 3604(c), by posting a discriminatory housing advertisement on Craigslist.

After consideration, the Court will deny Respondents' *Motion for Summary Judgement* and grant HUD's *Motion for Partial Summary Judgment*, for the reasons discussed below.

I. This Court lacks authority to deem the Act unconstitutional.

Respondents suggest that enforcing the Act against them in this case would implicate constitutional concerns. In support, Respondents quote at length from a decision in which the Ninth Circuit found that, in order to avoid constitutional concerns relating to privacy, safety, autonomy, and intimate association, sections 804(b) and (c) should be interpreted in a way that excluded "roommate selection" from the reach of the Act. Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC, 666 F.3d 1216 (9th Cir. 2012). Similarly, in this case, Respondents characterize their interactions with Complainant as part of a roommate selection process and argue that government regulation of their ability to choose a roommate implicates constitutional privacy and safety considerations. They conclude that HUD's authority to enforce the Act "stopped at the door of [their] residence."

HUD disagrees, arguing that Respondents' reliance on Roommate.com is misplaced. HUD also contends that this Court lacks jurisdiction to rule on the constitutionality of the Act.

A ruling on the constitutionality of the Act would exceed the scope of this Court's authority. "Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." Oestereich v. Selective Serv. Sys.

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[1] Respondents initially moved for summary judgment on August 30, 2019, but filed an amended version of the motion on September 5. The amended version differs from the original in that it includes a single additional paragraph raising a new defense under 42 U.S.C. § 3603(b)(2).

[2] In their opposition to HUD's *Motion for Partial Summary Judgment*, Respondents raise an additional argument that Complainant lacks standing to bring a complaint against them. Because Respondents do not identify any reason why they believe standing is lacking, this argument is rejected.

Local Bd. No. 11, 393 U.S. 233, 242 (1968) (Harlan, J., concurring in result); see also Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 215 (1994). Accordingly, this administrative Court lacks jurisdiction to declare the Act unconstitutional as applied to Respondents. See Buckeye Indus. v. Sec'y of Labor, 587 F.2d 231, 235 (5th Cir. 1979) ("No administrative tribunal of the United States has the authority to declare unconstitutional the Act which it is called upon to administer."); see also *In re* Navajo Hous. Auth., 2016 HUD ALJ LEXIS 2, at *30-33 (HUD Secretary May 2, 2016) (finding that HUD lacks jurisdiction to decide a constitutional question).

II. *Roommate.com* was wrongly decided and the Court declines to follow it.

To the extent Respondents are asking not for a ruling on the constitutionality of the Act, but merely for this Court to follow the Ninth Circuit's lead in Roommate.com and interpret the Act narrowly to avoid potential constitutional concerns, this Court is not persuaded by the reasoning in Roommate.com and believes the case was wrongly decided.[3]

Roommate.com involved an online service that matched users with potential roommates based on their profiles and preferences and allowed users to search for available rooms meeting their criteria. 666 F.3d at 1218. Two housing organizations sued the service, Roommate.com, alleging that it had violated the Act by requiring users to disclose their sex, sexual orientation, and familial status and by steering and matching users based on those characteristics. Id. The task facing the Ninth Circuit was to determine whether Roommate.com's allegedly discriminatory actions fell within the scope of sections 804(b) and (c) of the Act.

As discussed above, section 804(c) proscribes discriminatory notices, statements, or advertisements made "with respect to the sale or rental of a dwelling." 42 U.S.C. § 3604(c). Section 804(b) prohibits discrimination in "the sale or rental of a dwelling." Id. § 3604(b). Notably, neither subsection contains any limitations or exceptions based on the identity or status of the person accused of engaging in the discriminatory conduct.

Nonetheless, an accused person's status as a "roommate" was crucial to the holding in Roommate.com. According to the Ninth Circuit, the pivotal question in that case was "whether the FHA applies to roommates." Id. at 1219. In resolving that question, the Ninth Circuit mistakenly posited that the reach of the Act must turn on the meaning of the word "dwelling," as used in sections 804(b) and (c). Id. The Court then reasoned that Congress could not have intended a "dwelling" to include portions of single-family homes or apartments in which living space is shared by roommates. Id. at 1220-22. The Court proclaimed that "[i]t would be difficult ... to divide a single-family house or apartment into separate 'dwellings' for purposes of the statute," and thus it "makes practical sense to interpret 'dwelling' as an independent living unit

[3] As an aside, even if this Court agreed with the reasoning in Roommate.com, Respondents have not established that it applies to the facts of the instant case. The Ninth Circuit limited its holding to situations involving "roommates" who share space within living units, implicating concerns about privacy, safety, autonomy, and intimate association. In this case, HUD argues that Respondents' arrangement with their tenants more closely resembles a pure business transaction than the sort of intimate roommate relationship at issue in Roommate.com. Because the applicability of Roommate.com hinges on the nature of Respondents' relationship with their tenants, which remains in dispute, Respondents have not shown that the facts of Roommate.com are sufficiently analogous to apply here.

and stop the FHA at the front door," thereby avoiding the constitutional concerns raised by shared living arrangements. Id. at 1220.[4]

However, contrary to the Ninth Circuit's suggestion that it would be unduly difficult to divide a single-family home into separate "dwellings," the Act contemplates this exact circumstance. First, the Act expressly defines a "dwelling" as including "any building, structure, *or portion thereof* which is occupied as, or designed or intended for occupancy as, a residence by one or more families." 42 U.S.C. § 3602(b) (emphasis added). A "family" can consist of a single individual. Id. § 3602(c). Thus, while a single-family house qualifies as a dwelling, so does a bedroom within that house that is rented to an individual tenant. In that case, the bedroom constitutes a "portion [of a building] occupied as ... a residence by" a one-person family, bringing it squarely within the Act's definition of a "dwelling." Id. § 3602(b).

If the Act's definition of "dwelling" were not clear enough, the existence of the "Mrs. Murphy" exemption unambiguously shows that Congress contemplated that a "dwelling" might consist of a single bedroom within a larger home. The Mrs. Murphy exemption is codified in section 803(b)(2) of the Act, which states: "Nothing in section 3604 of this title (other than subsection (c)) shall apply to ... rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence." 42 U.S.C. § 3603(b)(2). In other words, if a property contains four or fewer housing units and the owner lives in one of them, the property is exempt from some of the requirements of section 804.

Congress premised the Mrs. Murphy exemption on "the metaphorical 'Mrs. Murphy's boardinghouse.'" United States v. Space Hunters, Inc., 429 F.3d 416, 425 (2d Cir. 2005) (citing 114 Cong. Rec. 2495, 3345 (1968)). Traditionally, the proprietor of a boardinghouse rents out bedrooms in her own home, and may even provide meals for her tenants. Thus, the exemption was intended to provide a shield for "those who, by the direct personal nature of their activities, have a close personal relationship with their tenants." 114 Cong. Rec. 2495, 2495 (1968). The provision's congressional sponsors were very clear as to their intent to "exempt the rental or leasing of a portion of a single-family dwelling, which means in practical terms the letting of a room or rooms in a person's home." Id. Thus, Congress must have believed the Act was broad enough to apply to an individual room in a single-family home; otherwise, an exemption would not have been necessary.

Consistent with the Act's broad definition of "dwelling" and Congress' understanding that the Act extends to the letting of individual rooms within a single-family home, courts outside the Ninth Circuit have routinely applied the Act to housing arrangements involving the rental of individual rooms within a larger home where some living spaces are shared. For example, in Ho v. Donovan, the Seventh Circuit found that the Act applied to a condo unit in which bedrooms were rented out separately. 569 F.3d 677, 682 (7th Cir. 2009); see also Marya v. Slakey, 190 F. Supp. 2d 95 (D. Mass. 2001) (applying Act to single-family house where

[4] Although the Ninth Circuit professed its desire to avoid a constitutionality analysis, the Court did, in fact, spend several pages thoroughly analyzing the constitutional issue. See 666 F.3d at 1220-23. Arguably, the Court could have avoided both the constitutional question and the question of how broadly to interpret "dwelling" by finding that no dwellings of any sort were involved, if Roommate.com was simply introducing compatible users to each other so they could then search for housing together.

bedrooms were rented out individually). Other circuits have applied the Act to shared living facilities such as boardinghouses, halfway houses, and drug and alcohol treatment centers. E.g., Schwarz v. City of Treasure Island, 544 F.3d 1201, 1213 (11th Cir. 2008); Lakeside Resort Enters., LP v. Bd. of Supervisors, 455 F.3d 154, 160 (3d Cir. 2006); Samaritan Inns v. District of Columbia, 114 F.3d 1227 (D.C. Cir. 1997). And in applying the Act to a homeless shelter, the Ninth Circuit itself, in seeming contradiction to its later opinion in Roommate.com, cited with favor a HUD regulation stating that "rooms in which people sleep" can constitute individual dwelling units in situations where toileting and cooking facilities are shared. Cmty. House, Inc. v. City of Boise, 490 F.3d 1041, 1048 n.2 (9th Cir. 2007) (citing 24 C.F.R. § 100.201).

Against the weight of this caselaw, and in apparent disregard of the fact that Congress already crafted an exemption to address the privacy, safety, and autonomy concerns involved in shared living arrangements (namely, the Mrs. Murphy exemption), the Ninth Circuit's Roomate.com decision attempted to carve out a broad new exemption that is inconsistent with the language and structure of the Act. Specifically, the Ninth Circuit held that the Act "doesn't apply to the sharing of living units." Roommate.com, 666 F.3d at 1222. The Ninth Circuit reached this result by reinterpreting "dwelling" to exclude all housing arrangements involving the sharing of living units. This means that no residence in which occupants share living space—neither the condo at issue in Ho v. Donovan, nor the homeless shelter in Community House, nor a boardinghouse run by a "Mrs. Murphy" landlord—would meet the definition of a "dwelling" under the Act. Thus, the Ninth Circuit's approach unavoidably leads to results inconsistent with the existing caselaw.[5]

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[5] According to HUD, the Ninth Circuit's holding is limited to "roommate arrangements that d[o] not include the landlord-tenant relationship." Similarly, a U.S. District Court has "decline[d] to extend Roommate.com's holding to relieve landlords of their Fair Housing Act obligations," on the reasoning that an individual who is protected by the Act should not lose her protections against discrimination merely because she resides in a shared living unit, as this would exempt all landlords who rent shared living units from the coverage of the Act. Haws v. Norman, No. 2:15-cv-00422-EJF, 2017 U.S. Dist. LEXIS 154589, at *10 (D. Utah Sept. 20, 2017).

However, the Ninth Circuit did not, in fact, limit its Roommate.com holding to exclude landlords, which is precisely the problem, in this Court's view. As explained above, the Ninth Circuit reached its result by reinterpreting "dwelling," which fundamentally changes the scope of the Act's coverage. This is problematic for the very reason identified by the District Court in Haws v. Norman: it creates a coverage gap whereby any individuals who occupy shared living spaces will be excluded, by definition, from the Act's protections.

At least one court has already followed the Ninth Circuit's approach to reach a problematic result. In Kaeo-Tomaselli v. Butts, the plaintiff sued the owner and manager of a facility called the Pi'ikoi Clean and Sober House for Women after she was denied residence there. Civ. No. 11-00670 LEK/BMK, 2013 U.S. Dist. LEXIS 132917 (D. Haw. Sept. 17, 2013). The plaintiff, who had been born a hermaphrodite, alleged that she that was denied entry to the home because existing residents did not want her to live there for discriminatory reasons. Id. at *2. The District Court, citing the "roommate exception" of Roommate.com, held that the Pi'ikoi Clean and Sober House was exempted from the Act because it was a "privately owned group home where residents share rooms and/or living quarters and vote on accepting new residents." Id. at *9-10. In other words, based on Roommate.com, an entire multi-unit property was found to be exempt from the Act and the owner and manager were given a license to discriminate against prospective tenants on behalf of existing tenants.

This result runs counter to the Act's remedial purpose. The Act does not permit a landlord or property owner to engage in otherwise prohibited discrimination at the whim of his existing tenants or on behalf of a third party. Courts have never allowed a neighbor's preferences to excuse a property owner's discriminatory conduct. See, e.g., Robinson v. 12 Loft Realty, Inc., 610 F.2d 1032 (2d Cir. 1979) (allowing case to proceed against cooperative where residents had voted to block another resident's sale of his apartment unit to a black family). Likewise, courts have declined to find that an existing tenant's discriminatory roommate preferences justify the landlord's exercise of such preferences. See, e.g., Laflamme v. New Horizons, Inc., 605 F. Supp. 2d 378, 393 (D. Conn. 2009) (rejecting argument that owners of assisted living facility should enjoy leeway under the Act because they lease "shared rental housing" where tenants live in such close quarters that one tenant's residency may adversely affect another); Marya

In support of its reasoning, the Ninth Circuit cited various constitutional cases establishing a right to privacy in one's home. See Roommate.com, 666 F.3d at 1220-21. But the only actual housing case it cited was one in which HUD investigators declined to file a charge of discrimination against a woman in Michigan who had posted on her church bulletin board: "I am looking for a female christian roommate." Id. at 1222 (citing Fair Hous. Ctr. of W. Mich. v. Tricia, No. 05-10-1738-8 (Oct. 28, 2010) (Determination of No Reasonable Cause)). It may have been appropriate for HUD to exercise its prosecutorial discretion not to pursue a charge against the Michigan woman under the circumstances. But it was a substantial leap for the Ninth Circuit to look at HUD's decision not to prosecute in that particular case and conclude, as a matter of law, that anyone searching for a roommate is excused from the requirements of the Act due to constitutional privacy concerns. This holding is so broad that it would allow blatant discrimination of the sort the Act was intended to combat.

Contrary to Roommate.com's overbroad approach, Congress has indicated, in the context of the Mrs. Murphy exemption, that even a close personal relationship between occupants of a shared living space does not warrant a complete exemption from the Act's requirements. The Mrs. Murphy exemption is limited in several key ways. For one thing, Congress restricted its application to properties occupied by four or fewer families. 42 U.S.C. § 3603(b)(2). Moreover, the exemption applies not to any landlord, but only to an owner-occupant of the subject property. Id.; see, e.g., Marya v. Slakey, 190 F. Supp. 2d at 104 (declining to apply Mrs. Murphy exemption to occupant who acted as landlord's agent, but did not actually own the property).

Congress also made clear that a "Mrs. Murphy" landlord is not excused from *all* of the Act's requirements. Even where the exemption applies, a covered landlord is still bound by section 804(c)'s blanket prohibition on discriminatory statements, notices, and advertising. 42 U.S.C. § 3603(b)(2). This signals a Congressional judgment that requiring a person to refrain from posting discriminatory advertisements or making discriminatory statements is not overly burdensome or intrusive, even when that person is a "Mrs. Murphy" landlord who maintains a close personal relationship with her tenants. Such a relationship does not engender a positive right to discriminate. See United States v. Hunter, 459 F.2d at 213 ("While the owner or landlord of an exempted dwelling is free to indulge his discriminatory preferences in selling or renting that dwelling, neither the Act nor the Constitution gives him a right to publicize his intent to so discriminate."); Morris v. Cizek, 503 F.2d 1303, 1304 (7th Cir. 1974) (explaining that Mrs. Murphy exemption does not confer a positive right to discriminate).

The new exemption the Ninth Circuit sought to create in Roommate.com is inconsistent with the language and structure of the Act and with existing precedent. It is so broad that it leads to results that undermine the Act's remedial purpose, as it creates a coverage gap by stripping the Act's protections from any person who resides in housing where living spaces are shared. The exemption is also inconsistent with the limitations Congress placed on the existing Mrs. Murphy exemption and is so broad that it renders the Mrs. Murphy exemption largely redundant, in contravention of the canon against surplusage. See Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 669 (2007) (cautioning against "reading a text in a way that makes part of it redundant"); TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (noting "cardinal principal"

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v. Slakey, 190 F. Supp. 2d at 104 (refusing to grant exemption from Act where landlord allowed existing tenant to veto a prospective roommate for an allegedly discriminatory reason).

that statute should be construed such that "no clause, sentence, or word shall be superfluous, void, or insignificant"). For these reasons, Roommate.com was wrongly decided, and this Court declines to follow it.

Respondents have cited no other precedent that would support dismissing the claims against them based on any purported constitutional concerns. Accordingly, Respondents' *Motion for Summary Judgement* must be rejected to the extent it is based on constitutional concerns.

III. Respondents have not established that they are entitled to summary judgment based on the Mrs. Murphy exemption.

Respondents assert that the Court lacks jurisdiction to hear this case based on the Mrs. Murphy exemption. This argument is rejected. The Mrs. Murphy exemption is "an affirmative defense having no bearing on subject matter jurisdiction." United States v. Space Hunters, Inc., 429 F.3d at 425-27.

Further, by its plain language, the exemption does not apply to one of the two statutory provisions Respondents are accused of violating, section 804(c). 42 U.S.C. § 3603(b)(2); see United States v. Hunter, 459 F.2d 205, 213-14 (4th Cir. 1972) (stating that exemption does not apply to discriminatory advertising under 804(c)), cert. denied, 409 U.S. 934 (1972); Gonzalez v. Rakkas, No. 93 CV 3229 (JS), 1995 U.S. Dist. LEXIS 22343, at *13 (E.D.N.Y. July 25, 1995) (stating that exemption does not apply to discriminatory statements under 804(c)); HUD v. Dellipaoli, No. 02-94-0465-8, 1997 HUD ALJ LEXIS 22, at *12-20 (HUDALJ Jan. 7, 1997) (same). Thus, the Mrs. Murphy provision cannot exempt Respondents from HUD's claims that they violated section 804(c) by posting a discriminatory advertisement and making a discriminatory statement.

The Mrs. Murphy exemption may be available as a defense against HUD's allegation that Respondents violated section 804(a) by refusing to negotiate a room rental with Complainant because of her race. However, the exemption applies only to "dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other." 42 U.S.C. § 3603(b)(2). In this case, the parties dispute the number of bedrooms that Respondents were renting out to other families. This fact is material to the determination of whether the subject dwelling was "occupied or intended to be occupied" by four or fewer independent families such that the Mrs. Murphy exemption applies. Because a material dispute of fact exists as to whether the exemption applies, Respondents are not entitled to summary judgment based on the exemption at this time.

IV. Respondents are not entitled to summary judgment on HUD's claims that Respondents made a discriminatory statement and refused to negotiate a room rental with Complainant because of her race.

Respondents argue that they are entitled to summary judgment on all of HUD's claims because no discrimination occurred in this case. With respect to HUD's claims that Respondents made a discriminatory statement to Complainant, in violation of 804(c), and refused to negotiate

a room rental with Complainant due to her race, in violation of 804(a), Respondents deny making discriminatory statements or refusing to negotiate due to Complainant's race. Instead, Respondents allege that they simply did not want a roommate who would cook a lot.

However, according to Complainant, Respondent Dangtran told Complainant she could not rent the room because she is black, Dangtran's wife would not like it, and it would make Respondents' three other Asian tenants uncomfortable. Because material disputes of fact exist as to whether Respondents made a discriminatory statement and/or refused to negotiate with Complainant because of her race, summary judgment is not appropriate on these two claims.

V. HUD is entitled to summary judgment on its claim that Respondents posted a discriminatory housing advertisement.

Section 804(c) of the Act states, in pertinent part, that it is unlawful "[t]o make, print, or publish, or cause to be made, printed, or published, any ... advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race ... or an intention to make any such preference, limitation, or discrimination." 42 U.S.C. § 3604(c). A housing advertisement violates section 804(c) if it "suggests to an ordinary reader that a particular [protected group] is preferred or dispreferred for the housing in question." Jancik v. Dep't of Hous. & Urban Dev., 44 F.3d 553, 556 (7th Cir. 1995); see also Inclusive Cmtys. Project v. Lincoln Prop. Co., 920 F.3d 890, 912 (5th Cir. 2019).

Respondents do not dispute that their Craigslist housing advertisement asked prospective tenants to disclose their race. However, Respondents argue that they are entitled to summary judgment because it was lawful for them to inquire about race, asserting:

> [T]he question of race is used in job applications and on government forms and is therefore lawful. The respondent was simply attempting to gather as much information as possible to find the candidate that best suited the living arrangements. The respondent and his wife were renting rooms in their five-bedroom family home and did not want someone who would disrupt the household.

In their opposition to HUD's *Motion for Partial Summary Judgment*, Respondents further argue that an ordinary reader would not perceive their advertisement as discriminatory because their use of the word "race" did not convey that any particular race would be singled out.

Contrary to Respondents' argument, asking applicants to disclose their race indicates an intent to consider race as a preference or limitation when selecting a tenant. Thus, inquiring about prospective tenants' race in a housing advertisement is facially discriminatory under subsection 804(c). See Soules v. U.S. Dep't of Hous. & Urban Dev., 967 F.2d 817, 824 (2d Cir. 1992) (agreeing with HUD, in passing, that "there is simply no legitimate reason for considering an applicant's race"); Sec'y, U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 872 (11th Cir. 1990) (affirming finding that inquiring about race of potential buyer violated subsection 804(c)); HUD v. Roberts, 2001 HUD ALJ LEXIS 86, at *13 (HUD ALJ Jan. 19,

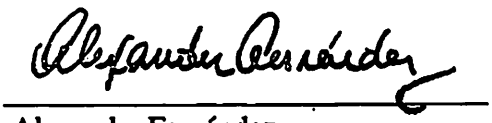
2001) (finding that inquiries about race are not reasonably related to qualification for housing and would lead a reasonable person to assume that race was being used a factor to determine eligibility).

Because Respondents posted a discriminatory housing advertisement on Craigslist, and because no material facts remain in dispute, HUD is entitled to partial summary judgment against Respondents with respect to its claim that they caused the publication of a discriminatory housing advertisement in violation of subsection 804(c).

ORDER

For the reasons discussed above, Respondent's *Motion for Summary Judgement* is hereby **DENIED** and HUD's *Motion for Partial Summary Judgment* is **GRANTED.**

So **ORDERED,**



Alexander Fernández
Administrative Law Judge